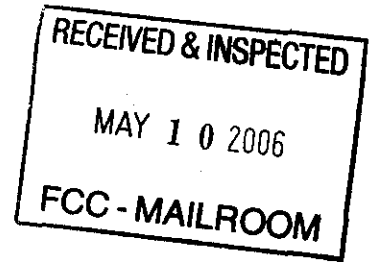


Before the
Federal Communications Commission
Washington, D.C. 20554



| | | |
|---|---|----------------------|
| In the Matter of: |) | |
| |) | |
| AUCTION 65 |) | DA 06-299 |
| Report No. AUC-06-65-B |) | |
| |) | |
| In the Matter of: |) | |
| |) | |
| Amendment of Part 22 of the Commission's |) | WT Docket No. 03-103 |
| Rules To Benefit the Consumers of Air- |) | |
| Ground Telecommunications Services |) | |
| |) | |
| Biennial Regulatory Review—Amendment of |) | |
| Parts 1, 22, and 90 of the Commission's Rules |) | |
| |) | |
| Amendment of Parts 1 and 22 of the |) | WT Docket No. 05-42 |
| Commission's Rules To Adopt Competitive |) | |
| Bidding Rules for Commercial and General |) | |
| Aviation Air-Ground Radiotelephone Service |) | |
| |) | |
| Application of Verizon Airfone Inc. for |) | File No. 0001716212 |
| Renewal of 800 MHz Air-Ground |) | |
| Radiotelephone License, Call Sign KNKG804 |) | |

To: Office of the Secretary
Attn: Chief, Auctions Division, and General Counsel

Response to and Informal Request for Reconsideration of
Order
Regarding
Petition for Declaratory Ruling, and
Supplement and Amendment of Motion for Stay and Rescheduling of Auction 65
Expedited Action Requested

Petitioners hereby respond to the Order referenced above and submits an informal request for immediate reconsideration.¹

¹ Exhibit 4 hereto, DA 06-1001. Exhibit 3 is the "Clarification PN. Exhibit 2 is Petitioners emails to the FCC and parties transmitting the Motion and Petition, and subsequent Supplement and Amendment thereto. Exhibit 1 is the just noted filings. Capitalized terms herein are defined in the attached filings. In this Response and Informal Request, Petitioners use single spacing as this is not a formal filing in which double spacing is required and single spacing is easier to read.

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List A B C D E

The Order states (underling and italics added):

While these questions on their face appear to ask for an interpretation of the Commission's *Air-Ground Order* and service rules, we note that, as the Havens Parties acknowledge, the *Air-Ground Order* and Section 22.853 of the Commission's rules expressly:

- prohibit anyone from holding a "controlling interest" in licenses authorizing the use of more than three megahertz of this spectrum.
- apply the definitions of "controlling interests" and "affiliate" in Sections 1.2110 (c)(2) and (c)(5) of the Commission's rules.

These provisions provide great detail about what constitutes a *controlling interest*, including specific guidance on when entities are deemed to have *control* on the basis of their affiliation.

That does not answer any of the posed questions, but only illustrates the problems the questions dealt with. Neither this rule (the "Rule") nor this Air-Ground Order say that "a controlling interest [includes] entities . . . deemed to have control on the basis of affiliation." (Nor does that solve t he problem, as shown below.) Rather, the Rule states:

For purposes of this rule, the definitions of "controlling interests" and "affiliate" set forth in paragraphs (c)(2) and (c)(5) of Sec. 1.2110 of this chapter shall apply. [Underlining added]

And the Air-Ground Order states:

44. We also will apply² the definitions of "controlling interests" and "affiliate" currently set forth in Sections 1.2110(c)(2) and 1.2110(c)(5) of the Commission's rules. These provisions . . . together with the other provisions of Sections 1.2110(c)(2) and 1.2110(c)(5) . . . will ensure that no entity will hold a controlling interest in more than three megahertz of spectrum [Footnotes in original deleted, underlining added.]

The meaning seems to be that "controlling interests" in 1.2110(c)(2) and "affiliates" in 1.2110(c)(5) are "controlling interests" in this Air-Ground service. "Controlling interest" in Section 1.2110(c)(2) is narrowly defined in traditional terms of *de jure* and *de facto* control of the entity, whereas "control" in 1.2110(c)(5) is far more broad. For example, in (c)(5) an officer, key employee, (presumptively) relatives, and many parties to a contract, are deemed to have control (sufficient control for affiliation), but they would not have controlling interest under (c)(2) by such status alone.³ Under (c)(5) all affiliates are deemed to have some level of

² This alone make the rule unclear. Does "apply" mean adopt in full, or apply those parts that staff finds from time to time "in the public interest," or what?

³ If (apart from Auction 65 and the subject Rule) all affiliates under (c)(5) are controlling interests under (c)(2) then, besides in this Auction, a large number of auction applications were

"control" (as (c)(5)(ii) indicates: "Nature of control in determining affiliation"), not, as the Order states, some "entities . . . deemed to have control on the basis of affiliation," which implies some *affiliates do not have control*. If all the Rule, the Air-Ground Order, and the subject Order mean by "applying" the definition of affiliates is what is meant under (c)(2), then that is nonsensical: there would be no sense in it, it would only lead to confusion. And if these mean that all affiliates, who all have some level of control, are controlling interests, then this auction is fatally flawed, including since many if not all short forms of bidders did not disclose all affiliates as controlling interests, and for other reasons indicated below and in Exhibit 1 below.

The Order artificially suggests that Petitioners seek a stay for individual purposes against the public interest. Instead, by the Order and preceding Clarification PN the Division avoids disclosing the answers it must have and be ready to use in the auction. The Order instructs that a stay would delay licensing and that would be bad, citing typical general "public interest" language the FCC resorts to when it cannot otherwise justify its actions. However (not meaning disrespect to hard working staff), it is the FCC that is notoriously slow in its decisions regulating the increasingly fast-paced market, and that otherwise regularly acts contrary to the foundation of "public interest" which are clear laws, unbiased and timely regulatory action, and transparency. This case is an example.⁴

Petitioners are not here making a full substantive response, and at this time it appears futile to expect pre-auction reconsideration given the commencement of the auction in a matter of hours, as well as the clear Division's clear avoidance of the questions raised by Petitioners, two times now, in the Clarification PN and then in the Order. However, prior to the auction commencement, Petitioners here put on record their strong disagreement with the Order, and note herein some reasons, as well as their intention to pursue an administrative or judicial appeal on both procedural and substantive grounds.

Nevertheless, Petitioners ask that the Bureau, upon this informal request, or its own motion, immediately change the decision in the Order consistent with the Supplement and Amendment filed yesterday (Exhibits 1 and 2 below) and not hold the auction until the fundamental problems identified by Petitioners and obvious to any reasonably careful and knowledgeable reader are remedied.

The Petition and Motion were submitted and served on 5-1-06 by email. The Division responded, without emailing a copy to Petitioners, on Friday 5-5-06 with a certain Clarification

fatally flawed in their disclosures of controlling interests. After the short form filing deadline, no changes in controlling interest may be made.

⁴ For example, while the Commission and its delegated authorities extend scant relief for even nominally late petitions under Section 1.106, citing such asserted "public interest" concern over delays, the Commission itself hardly ever meets the statute in the Communications Act requiring it to respond to certain petitions under this section within 90 days. Petitioners and affiliates have been subject to both sides of this, repeatedly. Applicants and licensees, especially smaller companies, are seriously injured by being subject to unclear fundamental rules and procedures which allow Commission authorities to arbitrarily or prejudicially rule, by the delays this creates including by challenges, and by the distrust in the Commission that this creates.

Public Notice but not referencing the Petition and Motion. Petitioners obtained a copy off the FCC website and immediately responded on the next business day, Monday 5-8-06 with an *Supplement and Amendment related to the Clarification PN*. The following business day, 5-9-06, the Division released the Order that addressed the initial Petition and Motion but not the Supplement and Amendment that was essential to the issues. Prior to the start of the next day (at this time), Petitioners submit this initial response to the Order for reasons noted above. Petitioners do not understand from this sequence and the content of the Clarification PN and Order any valid lawful reasons why the Division first ignored the Petition and Motion in the Clarification PN, then ignored the Supplement and Amendment in the Order, when the issues were clearly presented and easy to answer.

As stated in Petitioners' Supplement and Amendment (filed on 5-9-06 with the below email, and by courier), Petitioners' position is not merely that it would be helpful to clarify Section 22.853 (the "Rule") and related procedures, but that it is unconstitutional and unenforceable due to being overly vague. It is overly vague and fatally flawed since it does not state in any intelligible manner what are controlling interests: it "applies" the definitions in another rule of both controlling interests and affiliates, which is a clear a mud. Controlling interests in that referenced rule are narrowly defined, and affiliates are very broadly defined. Affiliates are most any entity with a close connection, and certainly this can mean any party with any agreement with or interests in a bidder that is not straight debt or minor equity, and this would include agreements with another bidder: Petitioners are not the only parties with such agreement.

We do not believe the Division has authority to hold an auction when, as in this case, the fundamental eligibility rule is unconstitutionally vague and otherwise fatally flawed: the rule that: (i) determines, for most if not all Form 175 applications in this auction, what is a qualifying application that does not need major modification (such applications would be fatally flawed due to failure to list all controlling interests, if all "affiliates" are controlling interests); (ii) determines how the Division will, after a round, decide whether to dismiss certain bids, and if so, which one of the bids it will dismiss; (iii) determines how the Division will process Forms 601 to licensing.

If the Division has an interpretation of this very unclear Rule, it could have simply stated it. The problem appears to be that the Division did not previously consider that this Rule may mean that *all* "affiliates" are "controlling interests" and if so (and even if a court were to find the Rule not unconstitutionally vague), this auction is already fatally flawed since all or most all applications either disclosed, or, with larger non-DE bidders, must have, affiliates but the applicants did not include affiliates under disclosed controlling interests, and to amend applications for this purpose after the filing deadline would be a major amendment and is not allowed.

In any case, a fundamental problem is not what clarification the Division will disclose at some point (that is problem enough: it must have one at this time but will not disclose it) but that the rule is fatally flawed, and no staff interpretation or Order can fix it. As discussed in the Petition and Supplement, it must be fixed by rule making under APA procedures, either amending the rule or at least a declaratory ruling subject to public notice and comment.

This cannot be done after the auction, without its rescission, since such a new rule cannot be retroactively applied.

This Rule, even considering the paragraph cited in the Petition from the Air-Ground Order relating to this Rule, simply does not state what are "controlling interests." Instead, the Rule and this paragraph say the FCC will "apply" definitions of controlling interests and affiliates in Section 1.2110 subparts. Our Petition, and further in its Supplement, asked the simple question as to what the Division (or Bureau or Commission) thinks this means. If the Division does not have an answer to this, it cannot, as it asserts in the Order and in the Clarification PN, know how to process certain bids by bidders who have the same, or some of the same, controlling interests. (And this does not just apply to Petitioners as the Division must know but still suggests in the Order and in the Clarification PN.) If the Division does have an answer to this, then should have simply answered the Petition on this fundamental question.

The Order did not address the Supplement and Amendment which it had well before (given the shortened time frames) before release of the Order. The Order did not address the fundamental questions raised in the initial Petition and Motion. It suggested these were not ripe. Yet it took pains to discriminatorily narrow the questions and answer them to box in Petitioners alone. If these questions are not ripe, then the Division should not have selectively ripen them to restrict some but not the other bidders. That is unequal, unfair, and chilling.

For the above reasons, Petitioners disagree with the Order and request immediate reconsideration.

Respectfully,

(Filed electronically. Signature on file.)

Warren Havens

President:

AMTS Consortium LLC, and

Intelligent Transportation & Monitoring Wireless LLC

2649 Benvenue Avenue # 2-3

Berkeley, CA 94704

(510) 841 2220 phone

(510) 841 2226 fax

May 10, 2006, prior to 8 AM Eastern time

Exhibit 1

The Supplement and Amendment, followed by the Petition and Motion.

Before the
Federal Communications Commission
Washington, D.C. 20554

| | | |
|---|---|----------------------|
| In the Matter of: |) | |
| |) | |
| AUCTION 65 |) | DA 06-299 |
| Report No. AUC-06-65-B |) | |
| |) | |
| In the Matter of: |) | |
| |) | |
| Amendment of Part 22 of the Commission's |) | WT Docket No. 03-103 |
| Rules To Benefit the Consumers of Air- |) | |
| Ground Telecommunications Services |) | |
| |) | |
| Biennial Regulatory Review—Amendment of |) | |
| Parts 1, 22, and 90 of the Commission's Rules |) | |
| |) | |
| Amendment of Parts 1 and 22 of the |) | WT Docket No. 05-42 |
| Commission's Rules To Adopt Competitive |) | |
| Bidding Rules for Commercial and General |) | |
| Aviation Air-Ground Radiotelephone Service |) | |
| |) | |
| Application of Verizon Airfone Inc. for |) | File No. 0001716212 |
| Renewal of 800 MHz Air-Ground |) | |
| Radiotelephone License, Call Sign KNKG804 |) | |

To: Office of the Secretary
Attn: Chief, Auctions Division, and General Counsel

Supplement to Petition for Declaratory Ruling, and
Supplement and Amendment of Motion for Stay and Rescheduling of Auction 65
Expedited Action Requested

Petitioners hereby supplement the Petition and amend Motion referenced above filed in one filing on April 1, 2006, and correct the date of its filing and service (the "Supplement").¹

¹ Capitalized terms used herein have meanings given in the Petition and Motion. The Petition and Motion are attached (the text is identical to the initial electronic filing, but there may be changes in format such as line and page breaks.) This filing, including the initial Petition and Motion text, are also being filed with the Commission by courier in hard copy.

This Supplement, electronically transmitted for filing and service to the parties on Monday 5-8-06, is in response to the Public Notice released on Friday 5-5-06.² If the Commission does not accept under its rules and procedures or by waiver (hereby requested, including due to the emergency nature of the Motion) the filing of the Petition and Motion electronically on May 1, 2006 with copies also electronically filed on that date in the dockets and application captioned above (as was done), then the filing of this Supplement with the attached Petition and Motion by courier upon the Commission (as well as electronically) will serve to cure the defect.

Petition and Motion Supplement

The Clarification PN in minor part answered the Petition (with no mention of the Petition), but raises further fundamental questions needing clarification prior to a fair and effective auction, and was discriminatory and apparently retaliatory. The Clarification PN articulated a new rule or rule interpretation that would restrict only Petitioners in this auction – a restriction related only to the identical “common control” that exists between the two Petitioner entities.³ There is no such narrow restriction in Commission rules, rather, there is a much

² Public Notice, “Clarification of Treatment of Bids by Bidders Sharing a Controlling Interest,” DA 06-984, dated May 4, 2006 but released May 5, 2006 (the “Clarification PN”). No copy was electronically transmitted to Petitioners, although it clearly was in response to the Petition and Motion (a hard copy arrived a few minutes prior to this filing by Federal Express). As an initial matter, Petitioners question whether in a Public Notice of this nature, the Auctions Division staff can make an enforceable material change or clarification to any Commission rule or Order, as it appears to attempt, or can give rights to its staff to decide, with no criteria disclosed, upon which bids among certain bidders, after allowing them to be placed, it will then reject. In contrast, Petitioners sought a Declaratory Ruling under Section 1.2 that would be binding upon the Commission and would constitute “rule” making under the Administrative Procedures Act as discussed below and should be conducted accordingly.

³ The Clarification PN was careful to limit the scope of the PN to Petitioners: See footnote 4 and other similar references using the same “common control” phrase. It is clear that the Clarification PN was in response to the Petition and Motion, but to avoid the real questions in the Petition—which would have affect upon all or most bidders—, and to avoid addressing the Motion, and to chill Petitioners from pursuit of their due process rights in the Petition and Motion. Petitioners and affiliates have experienced such responses too often from FCC staff on

broader restriction under Section 22.853—which the Petition sought to clarify with regard to all bidders⁴—that is in regard to any sort controlling interest, created “directly or indirectly,” “de jure or de facto,” by, apparently, certain defined “controlling interests *and* affiliates”:

No individual or entity may hold, directly or indirectly, a controlling interest in licenses authorizing the use of more than three megahertz of spectrum (either shared or exclusive) in the 800 MHz commercial aviation Air-Ground Radiotelephone Service frequency bands (see Sec. 22.857). Individuals and entities with either de jure or de facto control of a licensee in these bands will be considered to have a controlling interest in its license(s). For purposes of this rule, the definitions of “controlling interests” and “affiliate” set forth in paragraphs (c)(2) and (c)(5) of Sec. 1.2110 of this chapter shall apply.

It is clear that a proper interpretation of this rule, and its application in special bidding rules for Auction 65 yet to be formulated, is required as requested in the Petition as hereby supplemented. Among the many reasons that can be easily understood are the following: Depending on whether or not an “affiliate” is a “controlling interest” in this Air-Ground service (see the Petition discussion of this question), all or most all bidders (since all or most all disclosed affiliates) may (i) have incorrect and disqualifying Forms 175 if the controlling

too important of issues to believe the incidents are inadvertent or isolated, or to be able to accept the adverse direct consequences and indirect chilling of rights. Petitioners and affiliates have such past cases on appeal before the courts and Commission, and intend to do so in this case if needed. Petitioners are copying the General Counsel’s office on this filing for this purpose.

⁴ All or virtually all bidders disclosed bidding agreements and/or affiliates. Clarification of the questions posed in the Petition would or may have major impact upon all such bidders’ Form 175 validity, bidding qualification, financing (and commitment level based on risk), strategy, and post-auction operation and disposition of licenses. Bidders should not have to enter an auction without such matters being very clear well before auction commencement, nor it is in the public interest to hold an auction prior to such time, since it would not be a fair and capable attempt by FCC staff at making a market. As indicated in the Petition, Petitioners have been in many FCC auctions (including LMS, AMTS, VPC, MAS, and 220 MHz) (never with any default, disqualification, or sanction) but far too often after an auction, due to unclear or contradictory rules prior to auction or lack of their application in the auction process, the results involved years of challenges before the Commission by third parties and/or years of tardy Commission clean up actions (“conforming” rules to “intent,” or the like, but in the meantime causing delays, waivers, etc.), many which drag on to this day. Thus, Petitioners and affiliates now make attempts prior to an auction to have fundamental rules that are not clear made clear.

interest, or shared controlling interests, were not accurately disclosed⁵ (such as if the applicant guessed wrong on this question), and (ii) have more or less funds to use in bidding. Regarding this last point, a party that provides funds or other support for license bidding and/or subsequent operations (if the bidding is successful), often will not do so on a straight debt basis, but on a basis that involves affiliation as defined in Section 1.2110. This is since bidding and post-winning operations are unpredictable and risky business to pursue and thus outside funding sources often either require rights to a level of interest in the bidder that creates affiliation, or the source requires access to the licenses being sought which also may create affiliation (and as the Petition noted, the control of interest underlying Section 22. 853, including by "affiliation," is control in the licenses, not control in the entity per se).

The Motion (as amended below) should be granted,⁶ because, as further discussed herein:

(i) the Clarification PN responded to part of the Petition, and thus acknowledged the need for clarification of fundamental bidding rules as raised in the Petition, (ii) after release of the

⁵ Under Section 1.2105, change in controlling interest from what was submitted on Form 175 is a major amendment, and an applicant cannot make a major amendment to Form 175 after the filing deadline.

⁶ FCC staff may question whether Petitioners seek grant of the Motion for Stay in order to have additional time to seek, or free up, additional capital for bidding. (FCC staff asked this of Petitioners in Auction 61, through one of Petitioners' legal counsel, when Petitioners sought a stay in relation to a request to staff to follow existing rules and Orders on tribal land bidding credits rather than their public notice that in one place provided otherwise.) Petitioners explained in the Petition and Motion and further in this Supplement that without fair and clear rules, risks substantially increase and this inhibits auction financial commitments. Petitioners and their affiliates have had years of post-auction major problems (after in each auction they entered they were the or among the major winning bidders) created by lack of clear FCC rules prior to an auction or failure of FCC to follow rules in an auction or enforce them afterwards regarding competitors (see preceding footnote). In the case that the Motion is granted and the Petition is reasonably responded to then Petitioners expect to obtain and be willing to commit more funds to bid with in Auction 65 and in post auction license developments. In this case, other bidder's bidding may or may not change, but these matters are ultimately speculative and cannot be proven. In any case, the justification for grant of the Motion and response to the Petition are the public interest reasons given therein, not any bidder's interest separate therefrom.

Clarification PN (after any such clarification), even if defective and discriminatory (as is the Clarification PN as discussed herein), the affected bidders must have time to complete their bidding preparations, (iii) the Clarification PN raises more questions and problems than it solves, (iv) the changes or amendments sought in the Petition are needed and would constitute "rule" making under the Administrative Procedures Act which requires public notice and comment and a period after publication for putting into effect, and (v) without such changes or amendment Section 22.853 is unconstitutionally overly vague and thus unenforceable.

In addition to the above, the Clarification PN poses other problems that should be remedied well before auction commencement: First, the PN on page 2 states:

That is, a single bidder, or multiple bidders sharing a common controlling interest, may place bids on multiple licenses, including licenses that comprise a single band plan. The process of determining provisionally winning bids will not select two such bids (*i.e.*, two bids on two licenses in a single band plan placed by a single bidder or by multiple bidders sharing a common controlling interest) as the provisionally winning bids on both licenses. Nevertheless, one of the bids placed by a bidder, or by multiple bidders that together may not hold more than one license, may be selected as a provisionally winning bid.

Clearly, this is meant to apply to the auction closing winning bids also (many bids when placed may become either a provisional or winning bid). With regard to provisional and ending winning bids, the fundamental problem here is that in "the process of determining . . . one of the bids. . . [that] may be selected" is not defined. It is apparently at the discretion of the person(s) behind the "process" who "may" or may not select "one" or the other of such bids. This could of course affect the outcome of the auction, as well as intermediate round results (which also can affect the end of the auction since such intermediate rounds involve use of bidding tools, including activity waivers, bidding reassessment, and other matters that can affect future round bidding).

Further on page 2 the Clarification PN states:

The FCC Auction System's selection of provisionally winning bids does not

constitute a Commission determination that winning bidders are eligible to hold a *license pursuant to Section 22.853 or any other Commission rule. The restriction against selecting more than one provisionally winning bid from bids by multiple bidders with a shared controlling interest will be implemented based on information the applicants provided in short-form applications to participate in the auction. Each winning bidder remains responsible for compliance with all applicable Commission rules governing application for a license and licensees, including Section 22.853. Winning bidders that are ineligible to hold a license for any reason are subject to default payments under Section 1.2104(g)(2) [Footnote in original deleted.]*

A problem here is that allowing more bids than can count in a round may skew the bidding process.⁷ It would be an easy matter, as suggested in the Petition, to establish a bidding mechanism that simply did not allow bids that count not be count or could not result in a winning bid. (There is no telling when bidding in a round if such round and such bids will be the final round and winning bid.)

Also, in the above the FCC staff notes that they may use default as a cure if a winning bid is not allowed under the restrictions in Section 22.853.⁸ This is not in the public interest for reasons given in the Petition, drawing upon the LMS auction where this happened as an example—nor is it even possible without clarification of Section 22.583 for reasons given in footnote 5 and the related text item “(i)” in text above.

In addition, this raises the question of which of the two winning bids will be defaulted: will Commission staff allow the two bidders to decide (if they agree), or will staff decide? This level of discretion to clean up such a major problem is subject to challenge including by the

⁷ For example, where certain bidding in this auction is rejected by staff after the round ends (based on its interpretation of Section 22.853), but it counted for purposes meeting bidding activity without a waiver, as the Auction PN and the Clarification PN combined appear to provide.

⁸ As the Clarification PN notes, the staff are aware of the disclosures on Forms 175 by which (at least if the applicable rules were clear), staff could determine what bids were permissible and could result in qualifying provisional and winning bids. However, see footnote 5 and the related text item “(i)” in text above: if Section 22.853 is not clarified, then it is quite possible that some Forms 175 are inaccurate and under current rules, disqualified.

bidder that gets defaulted, or by other bidders who may seek to buy the subject license without another auction, and by others who seek it in another auction.

Petitioners do not believe such fundamental decisions should be left to the discretion of staff when the matters could have been easily addressed by a clear and timely rule change or declaratory ruling (which is also “rule” making under APA: see below) well prior to the auction.

Further, the Clarification PN on page 3 states:

A more complete description of the process for determining the minimum acceptable bid for nonprovisionally winning licenses reflects the fact that multiple bidders sharing a common controlling interest cannot win more than one license. Thus, for non-provisionally winning licenses, the “price” used to determine the minimum acceptable bid will be equal to the amount of the highest bid placed on the license by any bidder that does not hold a provisionally winning bid and does not share a common controlling interest with another bidder that holds a provisionally winning bid.

This solution,⁹ however, is different from the solution given above (see first quote above) for provisionally winning (and final winning) bids. Here, the solution is to not count either of the bids of the entities with “common” controlling interests, whereas in the former the solution was that “the [unexplained] process” would select one or the other. Why the difference? This, again, illustrates that problem of allowing under the bidding mechanism any bids that cant be counted (see discussion above). It also illustrated the problem with staff rule making at the last moment. Any fundamental bidding rule, and round decision rule, has an effect as or more major than many rules passed by the Commission. At minimum, such “rules” should be by binding Declaratory Ruling by the Commission or delegated authority, with allowance for public comment—as properly sought in the Petition.

As noted above, these major questions raised by the Clarification PN add to the fundamental ones posed in the Petition, attached below. Auction staff, by the Clarification PN,

⁹ This “reflect[ion]” itself is apparently the “more complete description.”

has commenced addressing these matters, and should grant the Motion and complete the process. Otherwise, as it stands, proceeding with auction as scheduled is unfair, unequal, and violates due process, including under Commission decisions in part discussed below.

In the Air-Ground Order, the Commission decided (footnotes in original shown but not included as a footnotes below; underlining added):

A. Incorporation by Reference of the Part 1 Standardized Auction Rules

26. In the *Air-Ground Auction Notice*, the Commission proposed to conduct auctions of both commercial and general aviation air-ground licenses in conformity with the general competitive bidding rules in Part 1, Subpart Q, of the Commission's Rules, and substantially consistent with the bidding procedures that have been employed in previous Commission auctions.⁹⁰ Specifically, the Commission proposed to employ the Part 1 rules governing, among other things, designated entities, application and payment procedures, collusion issues, and unjust enrichment. Under this proposal, such rules would be subject to any modifications that the Commission may adopt in its Part 1 Competitive Bidding proceeding.⁹¹ The Commission noted that because alternative band plans are being made available in the 800 MHz air-ground service, with the selection of the final band configuration to be determined by applicants' bids in the auction, the determination of whether individual applications are mutually exclusive for purposes of Section 309(j) of the Communications Act will be based on whether different applicants have applied for licenses in different band configurations as well as on whether different applicants have applied for the same licenses.⁹² The Commission tentatively concluded, however, that this and any other differences from its past auctions do not necessitate any changes to the Part 1 competitive bidding rules, and that the Wireless Telecommunications Bureau can address such differences through its standard practice of seeking comment on and establishing procedures for specific auctions.⁹³

27. We adopt our proposal to auction both 800 MHz commercial and 400 MHz general aviation air-ground licenses in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules. The only party that commented on this proposal, Space Data, supports the use of our Part 1 competitive bidding rules for the commercial air-ground service, indicating that the use of these well-established rules provides auction participants with consistent guidance, reduces the burden on the public and the Commission of developing service-specific auction requirements, and ensures that the commercial air-ground auction will not be unduly delayed.⁹⁴ Space Data also states that any differences from past auctions resulting from the ability to bid under alternative band configurations do not necessitate changes to the Part 1 competitive bidding rules.⁹⁵ We agree that using our Part 1 rules provides auction participants, the public, and the Commission with significant benefits, and we believe that they should be applied absent any demonstrated need to alter them for

particular circumstances. Because we find no need to change them here, we will *apply these rules to both commercial and general aviation air-ground auctions.*

Above, the Commission, consistent with the requirements of the Administrative Procedures Act (“APA”) for agency rulemaking, correctly subjected substantive bidding rules and procedures (procedures are “rules” under the APA)¹⁰ to public notice and comment. However, as shown in the Petition and this Supplement, the concluding finding above was in error—there is indeed a need to alter the standard bidding rules¹¹—and thereafter the Bureau’s implementation of this decision repeated the error in the Auction PN (DA 06-299, rel. Feb. 21, 2006), and finally the Clarification PN, avoiding Petitioners’ Petition, failed to fix this problem.

The needed clarifications and/ or amendments requested in the Petition (as hereby Supplemented) would constitute under the APA substantive rules not exempted from its requirements of public notice and comment and a post-publication 30-day minimum period prior to becoming effective,¹² including since they would define and impose major restrictions on bidder and licensee eligibility, and as such, also have major effect upon any affected bidder’s

¹⁰ 5 U.S.C. § 551:

. . . . “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing; . . .

¹¹ This is clear by the questions posed in the Petition as hereby Supplemented, including the questions related to whether, given the language in Section 22.853 (which clearly needs amending or clarification to be understandable), *any* agreement between bidders is permissible, and if so, whether *some* bidding among such bidders is prohibited (or, as the Clarification PN suggests as an apparent quick fix, would be allowed, but then ultimately rejected by staff by a criteria not described). The standard Part 1 rules on auctions do not apply without substantial changes for this auction that is unique based on the three band-plan configurations, the eligibility restriction, and other matters.

¹² 5 U.S.C. § 553.

auction preparation, plans, risk analysis, and financing commitments (as described in the Petition and Motion, and Supplement). Without such clarification and/or amendment, Petitioners believe that the current rule Section 22.853 and related public notices are too vague to be legally valid agency action.¹³

Amendment of the Motion

For reasons just given, the two 21-day period described in the Motion are hereby amended to 30 days.

Correction to the Petition and Motion Certificates of Service

The correct dates on these should be May 1, 2006 (the filing date), not April 31, 2006.

Closing

Accordingly, as hereby supplemented and amended, the Petition should be answered and the Motion granted.

[Execution on following page.]

¹³ The Due Process Clause of the Constitution prohibits laws so vague that persons of ordinary intelligence must guess at their meaning. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972), *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921). This basic due process concept has repeatedly been adopted by federal courts in determining whether agencies have overstepped their bounds in enforcing their regulations. *S. G. Lowendick and Sons, Inc. v. Reich*, 70 F.3d 1291 (D.C. Cir. 1995); *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993). The above text is from the House Report 104-859 - Regulatory Fair Warning Act.

Respectfully,

(Filed electronically. Signature on file.)

Warren Havens

President:

AMTS Consortium LLC, and

Intelligent Transportation & Monitoring Wireless LLC

2649 Benvenue Avenue # 2-3

Berkeley, CA 94704

(510) 841 2220 phone

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May 8, 2006

The Petition and Motion are attached hereto in the electronic version of this Supplement, but not in the mailed copies.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|---|---|----------------------|
| In the Matter of: |) | |
| |) | |
| AUCTION 65 |) | DA 06-299 |
| Report No. AUC-06-65-B |) | |
| |) | |
| In the Matter of: |) | |
| |) | |
| Amendment of Part 22 of the Commission's |) | WT Docket No. 03-103 |
| Rules To Benefit the Consumers of Air-Ground |) | |
| Telecommunications Services |) | |
| |) | |
| Biennial Regulatory Review—Amendment of |) | |
| Parts 1, 22, and 90 of the Commission's Rules |) | |
| |) | |
| Amendment of Parts 1 and 22 of the |) | WT Docket No. 05-42 |
| Commission's Rules To Adopt Competitive |) | |
| Bidding Rules for Commercial and General |) | |
| Aviation Air-Ground Radiotelephone Service |) | |
| |) | |
| Application of Verizon Airfone Inc. for Renewal |) | File No. 0001716212 |
| of 800 MHz Air-Ground Radiotelephone |) | |
| License, Call Sign KNKG804 |) | |

To: Office of the Secretary
Attn: Chief, Auctions Division

Petition for Declaratory Ruling
and
Motion for Stay and Rescheduling of Auction 65
Expedited Action Requested

Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium LLC, qualified bidder applicants in Auction 65 (“Petitioners”), hereby request a Declaratory Ruling on the questions posed below under Section 1.2 of the Commission Rules, and request a related stay and rescheduling of the auction as described below. Petitioners seek expedited action due to the proximity of the auction commencement date.

Motion for Stay and Rescheduling

Petitioners reserve the right to withdraw this Motion and the related Petition, and to seek alternative declaratory and stay relief in a court with jurisdiction on matters presented herein.¹

Petitioners hereby request that the start date of Auction 65 be rescheduled to a date that is

- (i) no less than 21 days after the release of a decision addressing the questions posed below, or
- (ii) if such decision would require or reasonably call for any new or amended Form 175 of any of the applicants found to be a qualified bidder applicant, or dismissal of any such Forms 175, then a date that is no less than 21 days after the release of a the latest public notice on such matters.

Petitioners are affiliates of each other and have a permissible, disclosed bidding agreement with regard to Auction 65. The questions posed below, and resolution thereof prior to the auction, are critical to the qualification and capability of Petitioners to participate in this auction. Also, there are other qualified bidder applicants in Auction 65 that also have a disclosed

¹ Petitioner may seek stay relief from a US court with jurisdiction without first moving before the Commission where “[U]nder the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter.” *Prometheus Radio Project v. FCC*, (3d Cir. 2003), No. 03-3388, Order, Sept. 3, 2003 (“Prometheus”). Petitioners have cause to seek such alternative, court relief. This includes, among other reasons, Petitioners experience in similar requests in a past auction that were not responded to. Prior to Auction 61, Petitioners requested formal responses from the Bureau on two matters critical to their participation. Neither was provided; however, Auctions staff advised that they will be “watching” Petitioners bidding. One matter involved Auction 61’s public notice on procedures deviating from the existing rules and Orders with regard to when final payments would be due when a winning bidder sought tribal lands bidding credits. This request was passed among various FCC staff, but was not answered. The other matter involved clarification regarding the permissibility under applicable rules of certain potential bidding by Petitioners, who are common-controlled affiliated entities, with a disclosed bidding agreement. Auctions staff responded to this orally, but would not provide any definitive or written response. By not providing either requested response, Petitioners were inhibited in this Auction 61, including their ability to bid higher amounts in the auction, and damaged in post-auction business, including by being subject to post-auction adverse petitions filed with the Commission in which Petitioner’s bidding of sort described in their second request, just noted, was artificially challenged.

*bidding agreement (see Exhibit 1 hereto), and/or affiliates, and who, Petitioners believe, may be affected by the posed matters and their resolution.*²

Petitioners did not participate in the above-captioned dockets with regard to Commission decisions and rules relating to Auction 65 and the subject Air-Ground Service. Petitioners, recently became interested in Auction 65 based on their internal business plan developments and thus sought to and did qualify to participate in this auction. Petitioners did not have cause to formulate and formally present the below questions until this time.³

The Motion should be granted for reasons given below, in sum: through no fault of Petitioners, an essential FCC rule section and provisions of a related Order need clarification or amending to be understandable and consistent, and thus allow for an effective and fair auction. When the letter or purpose of applicable rules are not followed in auction bidding and licensing, or an auction is permitted under rules, Orders, or instructions that are not clear or that are in conflict, the auction is defective including since these FCC errors artificially increase the risks and devalue the licenses involved, and may provide unfair advantage to some bidders.

For reasons described herein, the Motion satisfies the criteria for grant:⁴ (1) irreparable harm would result to some applicants including Petitioners if the Motion is not granted, (2) Petitioners are likely to prevail in obtaining responses to the substance of the questions posed

² Petitioners do not address whether applicants found not qualified may have a basis for relief based upon a resolution of the matters posed herein, including since Petitioners do not know the reason or reasons such parties were found not qualified. In any case, Petitioners include such parties in the attached Certificate of Service Addendum.

³ In preceding weeks, Petitioners submitted a request by email to FCC Auctions legal staff on some of the matters posed herein. In response, staff referred Petitioners to the two items described in footnote 7 below. As noted at end of that footnote, Petitioners do not believe these two items resolve any of the questions posed herein.

⁴ *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

herein, and the questions call for substantive response for the clear public interests that would be thus served thereby, (3) no party with interest (other auction applicants) would be adversely affected, principally since these questions on fundamental auction rules and post-auction licensing should be addressed prior to the auction for a fair, efficient, and effective auction and post auction licensing,⁵ and (4) the public interest would be served.

Regarding criterion 1 above, irreparable harm, for reasons given in the "Discussion" sections below, it appears that under the subject unclear rule and Order provisions, Petitioners and other applicants cannot or may not be able to bid in the auction under their existing bidding agreements, or at least such bidding would be restricted beyond existing auction procedures: In either case, such applicants, even if allowed such bidding by the auction bidding mechanism, would be at risk after the auction of Commission-imposed disqualification, default, or other sanctions, and of petitions to deny and other adverse third-party actions, and of loss of time and funds involved in such bidding and post-auction adverse actions. If such applicant harm occurs, it would also result in injury to public interests, including delays in licensing and related public and private services, expenditure of FCC staff time in these matters, potential need to reauction the spectrum,⁶ and injury to FCC auction integrity and thus to competition in future auctions.

⁵ Petitioners do not believe that, even if an applicant would benefit from proceeding to the auction as currently scheduled, it is entitled to such benefit where the auction and post-auction licensing involves, as it would, unclear and conflicting ground rules (as described herein) that, at minimum, disadvantage other applicants including Petitioners. In addition, "The harm to petitioners absent a stay would be the likely loss of an adequate remedy In contrast to this irreparable harm, there is little indication that a stay . . . will result in substantial harm to the Commission or to other interested parties. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Granting the stay pending judicial review would maintain the status quo in order to permit appellate review after briefing on the merits." Cited in the *Prometheus* stay Order (see footnote 1).

⁶ For example, see DA 99-1731, August 30, 1999, letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, to Eric W. DeSilva, Wiley, Rein & Fielding, regarding

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the default of Progeny LMS LLC in Auction 21, Location and Monitoring Service (copy available at: <http://wireless.fcc.gov/auctions/21/releases/da991731.txt>). The Auction 21 procedures and mechanism *allowed Progeny to bid on more spectrum* in BEA107, Minneapolis-St. Paul, MN, and BEA164, Sacramento-Yolo, CA, *than permitted under an applicable LMS rule* that provided that no one party may be licensed for more than 8 MHz in the LMS Multilateration service. This rule resulted, as the Commission intended and explained in related rulemaking Orders, in two competing licensees in this service—*the same in purpose, structure, and result as Section 22.853 serves with regard to the Air-Ground service*. Prior to this Auction 21, the controlling party in Petitioners, Warren Havens (who participated in Auction 21, buying most of the LMS-A block licenses in the nation) inquired of Commission staff as to whether they would not make it clear to all bidders that bidding on LMS licenses in a market in excess of this spectrum cap, if such bids were the final high bids, would result in defaults due to this spectrum eligibility cap. In response, FCC staff instructed Havens that FCC staff would not act to prohibit such bidding that could result in such default, but if any applicant did bid in such manner and obtained high bids for spectrum in excess of this spectrum cap, then a default would result. This resulted in these two major-market licenses that Progeny defaulted on not being licensed for several more years, waste of FCC staff time, and other private and public-interest injuries that could have been easily avoided had the FCC either created a bidding mechanism that did not allow bidding that could lead to such default, or at least made clear in a public notice before the auction that bidding inconsistent with this eligibility restriction must not be engaged in, with substantial sanctions established for violation in addition to standard default payments and ramifications.

Request for Declaratory Ruling

The questions posed pertain to Section 22.853⁷ of the Commission Rules:

Sec. 22.853 Eligibility to hold interest in licenses limited to 3 MHz of spectrum.

No individual or entity may hold, directly or indirectly, a controlling interest in licenses authorizing the use of more than three megahertz of spectrum (either shared or exclusive) in the 800 MHz commercial aviation Air-Ground Radiotelephone Service frequency bands (see Sec. 22.857). Individuals and entities with either de jure or de facto control of a licensee in these bands will be considered to have a controlling interest in its license(s). For purposes of this rule, the definitions of "controlling interests" and "affiliate" set forth in paragraphs (c)(2) and (c)(5) of Sec. 1.2110 of this chapter shall apply.

Questions Presented

1. Does "controlling interest" in Section 22.853 include all "affiliates" as defined Section 1.2110?
2. Does the eligibility restriction in Section §22.853 prohibit all bidding agreements of any kind among otherwise qualified bidders?
3. If the answer to question 2 is "no" (that is, at least some bidding agreements are permitted), then: Does the eligibility restriction in Section §22.853 prohibit two qualified bidders who have a bidding agreement with each other that was properly disclosed from bidding in any round for the both licenses in any one (of the three) license-pair configurations?
4. In the Air-Ground Order, paragraph 44 (cited below), what is meant by: "together with the other provisions of Sections 1.2110(c)(2) and 1.2110(c)(5), these provisions will ensure that no entity will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band"?

⁷ See also (1) Auction No. 65 Procedures Public Notice at paragraph no. 6. "Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Scheduled for May 10, 2006, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 65," Public Notice, DA 06-299 (rel. Feb. 21, 2006) (the "Auction PN"), and (2) the Air-Ground Order at paragraph nos. 39-44. Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review - Amendment of Parts 1, 22, and 90 of the Commission's Rules, Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service, WT Docket Nos. 03-103 and 05-42, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4403 (the "Air-Ground Order"). These two items deal with subject matters in, but do not answer, the questions posed.

Discussion of Question 1

Question: Does “controlling interest” in Section 22.853 include all “affiliates” as defined Section 1.2110?

Discussion: The Air-Ground Order (emphases added) provides:

44. We also will apply the definitions of “controlling interests” and “affiliate” currently set forth in Sections 1.2110(c)(2) and 1.2110(c)(5) of the Commission's rules.⁸ These provisions have worked well to identify individuals and entities that have the ability to control applicants for Commission licenses and therefore are well-suited to our goal here of ensuring that no party will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band. We note that Section 1.2110(c)(2) includes the requirement that ownership interests generally be calculated on a fully diluted basis,⁹ and also provides that any person who manages the operations of an applicant pursuant to a management agreement, or enters into a joint marketing agreement with an applicant, shall be considered to have a controlling interest in the applicant if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, the types of services offered, or the terms or prices of such services.¹⁰ We find that, together with the other provisions of Sections 1.2110(c)(2) and 1.2110(c)(5), these provisions will ensure that no entity will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band.

The above paragraph appears to mean but does not clearly state that the definitions of “controlling interests” and “affiliates” in, “together with the other provisions of” Sections 1.2110(c)(2) and 1.2110(c)(5), will be used to determine what is a “controlling interest” under Section 22.858. Under Section 1.2110, some “affiliates” have “controlling interests” and some don't. If all that the above paragraph meant was that the definition of “controlling interest” in

⁸ [Footnote 161 in original:] 47 C.F.R. §§ 1.2110(c)(2) & (5). These provisions define controlling interests and affiliates for the purpose of determining auction applicants' eligibility for small business provisions.

⁹ [Footnote 162 in original:] 47 C.F.R. § 1.2110(c)(2)(ii)(A)(1).

¹⁰ [Footnote 163 in original:] 47 C.F.R. §§ 1.2105(c)(2)(ii)(H) & (I).

Section 1.2110 will be used in Section 22.853, that could have been stated and that would have included affiliates that had controlling interest.

Thus, it is not clear whether “controlling interests” in Section 22.853 (i) means all “controlling interests” and all “affiliates” described in 1.2110(c)(2) and 1.2110(c)(5), or (ii) means all “controlling interests” described in 1.2110(c)(2) and 1.2110(c)(5).

Discussion of Question 2

Question: Does the eligibility restriction in Section §22.853 prohibit all bidding agreements of any kind among otherwise qualified applicants?

Discussion: Sections 1.2110(c)(2) and 1.2110(c)(5) describe various relations that would be deemed to give rise to a “controlling interest.” A bidder with a bidding agreement with another bidder by definition is in a relation where the two have agreed upon their actions in the auction to seek licenses, and possibly post-auction disposition of licenses obtained, each of which involves control that either does or may fall within the definitions of “controlling interest” in these Sections, and even more so if the answer to Question 1 above is that “controlling interests” in Section 22.858 means all “controlling interests” and all “affiliates” described in 1.2110(c)(2) and 1.2110(c)(5).

Also, while the purpose of Section 1.2110 is related to the bidder entity (e.g., see footnote 8 herein), the purpose of Section 22.583 is related to the subject two licenses. The “controlling interests” of concern under Section 22.585 is control of the licenses, not control in the licensee per se. Thus, even if one party may not have controlling interest in a bidder, or licensee, such party may have control over the bidder entity’s bidding for and disposition of a license, as may arise in a bidding agreement. Also, the Auction PN states that a bidder can place a final bid in a round on one license only.

From all the above, it appears that under Section 22.858 and the relevant provisions of the Air-Ground Order noted above that the answer to Question 2 is or may be “yes.”¹¹ However bidding agreements have been allowed and in fact Petitioners and other applicants have disclosed bidding agreements (see Exhibit 1 below). Thus, there appears to be a conflict between, on the one hand, the letter and purpose of the eligibility restriction language in Section 22.858 and the related Air-Ground Order paragraphs, and on the other hand, the bidding agreements thus far allowed and the bidding that will result under such agreements.

Discussion of Question 3

Question: If the answer to question 2 is “no” (that is, at least some bidding agreements permitted), then: Does the eligibility restriction in Section §22.853 prohibit two qualified bidders who have a bidding agreement with each other from bidding with the intent to have, and the possible result of having, the standing high bids at the end of a round of bidding for both licenses in any one (of the three) license-pair configurations?

Discussion. For the reasons given in the discussion above regarding Questions 1 and 2, it appears that the answer to Question 3 is “yes.”

Discussion of Question 4

Question: In the Air-Ground Order, paragraph 44 (cited below), what is meant by: “together with the other provisions of Sections 1.2110(c)(2) and 1.2110(c)(5), these provisions will ensure that no entity will hold a controlling interest in more than three megahertz of spectrum (shared or exclusive) in the 800 MHz air-ground band”?

Discussion: It should be clarified as to whether “these provisions” means the definitions of “controlling interests” and “affiliates” contained in Sections 1.2110(c)(2) and 1.2110(c)(5).

¹¹ For example: (i) if such bidders bid as posed in question 3 (bidding for both licenses in one of the license configurations), it would appear to be prohibited (see Discussion of Question 3), and (ii) if, instead, such bidders together submitted final bids in a round for licenses in more than one configuration, that would also appear to be prohibited, since the Commission allows a bidder to submit a bid on only one license as a final bid in a round, and in this auction, Section 22.858 appears to result in any bidders in a bidding agreement being deemed or possible deemed as having the same controlling interests (see Discussion of Questions 1 and 2).